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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER
VS
RICHARD D. PAYNE,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

GERALD L. WHITE
Prosecuting Attorney
Midland County, Michigan

LAWRENCE WILLIAM SMITH, JR.
Chief Assistant Prosecuting Attorney
Midland County Court House
Midland, Michigan 48640
Phone: (517) 832-6722

QUESTION PRESENTED

I.

IS A SEARCH WARRANT INVALID PER SE, AS BEING VIOLATIVE OF THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES, IF AUTHORIZED BY A MAGISTRATE WHO IS ALSO A SWORN DEPUTY SHERIFF BUT UNINVOLVED IN THE PURSUIT OF LAW ENFORCEMENT?

TABLE CONTENTS

Question Presented 1

Index of Authorities 3

Opinions Below 4

Statement of Jurisdiction 5

Constitutional Provisions Involved 5

Statement of the Case 5

Reasons for Granting the Writ 10

Conclusion 12

Appendix

"A" Opinion of the Michigan Court of Appeals . . 2a

"B" Opinion of the Michigan Supreme Court

"C" Defendant's Motion to Suppress

INDEX OF AUTHORITIES

CASE — PAGE

City of Lincoln Park v *Sigler*, 28 Mich App 410; 184 NW2d 524 (1970) 13

Coolidge v *New Hampshire*, 403 US 443; 449 91 S Ct 2022; 29 L Ed 2d 564 (1971) 8

Johnson v *United States*, 333 US 10, 13-14; 68 S Ct 367, 369; 92 L Ed 436 8

Lo-Ji Sales, Inc. v *New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979) 10

Shadwick v *City of Tampa*, 407 US 345, 350; 92 S Ct 2119, 2123; 32 L Ed 2d 783, 788 (1972) 8,9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

RICHARD D. PAYNE,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT

NOW COMES Gerald L. White, Prosecuting Attorney, by and for the County of Midland, State of Michigan, by and through Richard E. Priehs, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court for the State of Michigan entered in the above-entitled cause on February 18, 1986.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The opinion of the Michigan Supreme Court is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court for the State of Michigan was entered on February 18, 1986. The jurisdiction of this Court is invoked under 28 USCA Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The following statement of the case was drawn primarily from the Statement of Facts as stipulated to between the parties when submitted to the Michigan Supreme Court and Court of Appeals:

On January 6, 1983, William P. Mitchell, a Magistrate with the 75th District Court, issued a Search Warrant upon the residence and curtilage of the home of Defendant's parents, Richard and Eleanor Payne, located at 1766 East Gordonville Road, in the County of Midland. The search was of a permanent premises. The search resulted in the confiscation of the following items:

1. A Sears and Roebuck AM-FM CB radio;
2. An AM-FM AMC radio:
3. A piece of weathered wood;
4. Four tires and wheels.

Said evidence is a vital part of the prosecution's case as to all four pending counts.

William P. Mitchell has been Deputy Court Administrator and Court Officer for the 75th District Court of Midland County since approximately January 1, 1969. In November of 1979 he assumed the additional responsibilities of Magistrate.

Since January, 1969, William P. Mitchell has been a duly sworn member of the Midland County Sheriff's Department. However, since becoming Magistrate in November, 1979, his total involvement with law enforcement has been limited to occasional monthly meetings of the Midland County Sheriff's Department which he attends to receive training which assists him with his Court Officer functions. As Court Officer, he also occasionally transports prisoners and maintains order in the courtroom for the District Court Judge. He retains the Deputy or Reserve Deputy status strictly to assist with his duties as Court Officer, when he is not functioning as Magistrate.

Since becoming Magistrate, he has not participated in any criminal investigation nor worked road patrol.

Mr. Mitchell did not know the Defendant-Appellant nor any member of Defendant's family where the Search Warrant was executed and accordingly, no claim of personal bias has been argued.

Furthermore, there is no contest regarding probable cause for the Search Warrant to issue nor the Magistrate's ability to determine probable cause.

On March 2, 1983, Defendant-Appellant, Richard Payne, was bound over to Circuit Court on two counts of Unlawfully Driving Away an Auto and two counts of Receiving and Concealing Stolen Property Over $100.00.

On April 26, 1983, Defendant-Appellant brought on Motion to Suppress the above-mentioned Search Warrant claiming Mr. Mitchell was not a neutral and detached Magistrate, pursuant to the Fourth Amendment of the United States Constitution.

Presiding by appointment, Circuit Judge Hazen R. Armstrong, after taking testimony from Magistrate Mitchell, denied Defendant's Motion to Suppress (Appendix C), stating:

> "It seems to me the case decided *(Coolidge v New Hampshire*, 403 US 443, 1971) is an assistant prosecutor. There's a good deal of difference between an assistant prosecutor and the present magistrate. He's purely a reserve deputy as such and has indicated that he has done nothing in the way of investigation or anything in some time. And he, also, of course, must be a deputy to enable-- to do his functions as to a court officer. So I deny the motion."

Upon rehearing (Motion for Reconsideration) in the same Circuit Court before Judge Tyrone Gillespie, Defendant's Motion was granted (Appendix C), the Court issuing an opinion dated June 10, 1983, whereby it stated:

> "....that he (Magistrate Mitchell) is not qualified to issue search warrants so long as he is a reserve deputy sheriff.
>
> There has been no impropriety alleged or shown on Mr. Mitchell's part, however, the law is clear that any current connection with a magistrate and law enforcement fails to satisfy the appearance of justice."

On April 17, 1984, the Court of Appeals for the State of Michigan unanimously reversed the trial court (Appendix A), stating:

> "We hold that the trial court erred by granting Defendant's motion to suppress. Under the facts of the instant case, the Magistrate's affiliation with the sheriff's department, without more, is insufficient to support the finding by the trial court that the Magistrate was not sufficiently neutral and detached."

The Court of Appeals decision was based on its interpretation of three U.S. Supreme Court cases:

> *Coolidge v New Hampshire*, 403 US 443; 449 91 S Ct 2022; 29 L Ed 2d 564 (1971).
>
> *Johnson v United States*, 333 US 10, 13-14; 68 S Ct 367, 369; 92 L Ed 436.
>
> *Shadwick v City of Tampa*, 407 US 345, 350; 92 S Ct 2119, 2123; 32 L Ed 2d 783, 788 (1972).

Accordingly, the Michigan Court of Appeals ruled:

> "There was no showing that the Magistrate was engaged in the 'enterprise of ferreting out crime' and thus could not be neutral and detached. On the contrary, the trial court specifically found that the Magistrate 'has not participated in any criminal investigation nor worked road patrol' since becoming Magistrate.
>
> We hold that a mere affiliation, without more, between a Magistrate and a law enforcement group is insufficient to support a finding that a Magistrate is not neutral and detached.[1] Where, as here, an affiliation exists but there is no active pursuit by the Magistrate of a law enforcement career, the Magistrate is sufficiently neutral and detached for the purpose of issuing warrants." (Appendix A).

The Michigan Supreme Court heard the case upon a Petition for Certiorari releasing their opinion (Appendix B) on February 18, 1986, at which time they reversed the Michigan Court of Appeals. In deciding, the Court found that "Magistrate Mitchell's status rendered him incapable of satisfying the 'neutral and detached' requirement of the Fourth Amendment and its counterpart provision in Article 3, Section 2 of the Michigan Constitution."[2]

They specifically state that:

> "The United States Supreme Court has not decided whether mere status as a law enforcement official, in and of itself, renders a Magistrate incapable of being neutral and detached."

However, in concluding such, they cite numerous U.S. Supreme Court cases to support their reasoning and as the basis for their decision, including *Shadwick v Tampa*, 407 US 345, 348, 350-351; 92 S Ct 2119; 32 L Ed 2d 783 (1972), in stating:

> "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement."
>
> "The judge's dual status 'per se' disqualified [him] as a neutral and detached magistrate. *Coolidge v New Hampshire*, 403 US 450."

They continue, stating:

> "Absent exceptional circumstances, the Fourth Amendment mandates that an 'independent judicial officer', not the police, determine 'whether liberty or privacy is to be invaded.' *Jones v United States*, 362 US 257, 270-271; 80 S Ct 725; 4 L Ed 2d 697; 78 ALR 2d 233 (1960).

The Michigan Supreme Court, in referencing *Coolidge*, supra, and *Lo-Ji Sales, Inc. v New York*, 422 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979), states, 'A search warrant is invalid if the issuing magistrate also was an active participant in the investigation or prosecution of the underlying crime.'

Among other references to prior U.S. Supreme Court decisions they interject *United States v United States District Court*, 407 US 297, 317; 92 S Ct 2125; 32 L Ed 2d 752 (1972) in concluding a strict separation of powers (executive, legislative, and judicial) is mandated under the Fourth Amendment in stating, 'The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. ... individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.' "

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States has never stated that mere affiliation of a Magistrate with another branch of government vitiates the Magistrate's ability to function as neutral and detached for the purpose of issuing search warrants pursuant to the Fourth Amendment.

Accordingly, they have never construed an absolute separation of powers in that context.

The Michigan Supreme Court has done both in excluding, per se, any Magistrate with any executive branch affiliation as being violative of the Fourth Amendment's prohibition against unreasonable searches and seizures. When issuing warrants, such a decision is in contradiction to previous decisions of this Honorable Court.

All prior decisions of this Court have examined the extent (emphasis added) of the issuing Magistrate's involvement with other facets of government before determining if impropriety exists.

In *Coolidge v New Hampshire*, supra, the Supreme Court looked at the fact that the one issuing the search warrant was the state attorney general acting as a justice of the peace. He was deemed improper for purposes of the Fourth Amendment because he had personally taken charge of all police activities relating to the murder investigation and was later to serve as chief prosecutor of the accused.

Similarly, in *Lo-Ji Sales, Inc. v New York*, supra, the Magistrate was actively involved with law enforcement in the investigation of the crime associated with the search warrant.

Shadwick v City of Tampa, supra, makes the distinction that "an officer engaged in the often competitive enterprise of ferreting out crime" cannot draw inferences of probable cause. They stated that even though municipal court clerks were affiliated with the police and prosecutors and authorized to issue arrest warrants, such affiliation did not render them partial for purposes of issuing search warrants for they were assigned to, and subject to the supervision of the municipal court judge. No partiality was shown and there was no showing the clerks lacked capacity to determine probable cause.

In the case at bar, we have precisely the same situation with Magistrate Mitchell. He is an officer of the court who dropped all ties with law enforcement upon becoming Magistrate in 1979, except his title--Reserve Deputy Sheriff. Such title allows him to receive training to assist with his occasional functions of

transporting prisoners and serving subpoenas. He has not involved himself in any criminal investigations, nor actively or inactively ferreted out crime.

To make such a per se distinction based on the separation of powers not only contradicts applicable decisions of this Court but sets precedent for negating any judicial warrant where any affiliation exists suggesting even "an appearance of impropriety". Such a precedent has far-reaching effects beyond the impact of this case itself. In many states, including Michigan, the judiciary has, by statute, certain police powers. City of Lincoln Park, supra. Using the Michigan Supreme Court's own reasoning, they would of necessity have to disqualify themselves.

CONCLUSION

For the reasons stated above Petitioner submits that plenary review should be granted.

Respectfully submitted,

GERALD L. WHITE
Prosecuting Attorney
Midland County, Michigan

By: Richard E. Priehs
RICHARD E. PRIEHS (P32170)
Assistant Prosecuting Attorney
Midland County Court House
Midland, Michigan 48640
Phone: (517) 832-6722

Dated: April 28, 1986

[1] We note under Const. 1963, Art. 6, Section 29, each judge of this panel is a conservator of the peace within this state and can arrest for misdemeanors committed in his presence. *City of Lincoln Park v Sigler*, 28 Mich App 410; 184 NW2d 524 (1970).

[2] The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers in one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution.

APPENDIX

APPENDIX "A"

FOR PUBLICATION

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant v RICHARD DAVID PAYNE, Defendant-Appellee.	Docket No. 72798

Before: J. H. Gillis, P.J., and J. H. Shepherd and J. J. Kelley,* JJ.

PER CURIAM

Defendant was charged with two counts of unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645, and two counts of receiving and concealing stolen property, MCL 750.535; MSA 28.803. The trial court granted defendant's motion to suppress the evidence and plaintiff takes this appeal by leave granted.

The trail court summarized the facts as follows:

> "On January 6, 1983, William P. Mitchell, a Magistrate with the 75th District Court, issued a Search Warrant upon the residence and curtilage of Defendant's parents, Richard and Eleanor Payne, located at 1766 East Gordonville Road in the County of Midland. The search

*Circuit Judge, sitting on the Court of Appeals by assignment.

resulted in the confiscation of the following items: 1) a Sears and Roebuck AM-FM CB radio; 2)an AM-FM AMC radio; 3) a piece of weathered wood; and, 4) four tires and wheels. Said evidence is a vital part of the prosecution's case as to all four pending counts.

"William P. Mitchell has been Deputy Court Administrator and Court Officer for the 75th District Court of Midland County since approximately January 1, 1969. In November of 1979 he assumed the additional responsibilities of Magistrate.

"Since January, 1969, William P. Mitchell has been a duly sworn member of the Midland County Sheriff's Department, having full police powers. He retains that status, as Court Officer, to occasionally transport prisoners and be capable of keeping order in the courtroom including his power to arrest.

"Mr. Mitchell has also periodically attended monthly meetings of the Midland County Reserve Deputies in order to receive training. Since becoming Magistrate he has not participated in any criminal investigation nor worked road patrol.

"Mr. Mitchell did not know the Defendant nor any member of Defendant's family where the Search Warrant was executed and accordingly, no claim of personal bias has been argued.

"Furthermore, there is no contest regarding probable cause for the Search Warrant to issue nor the Magistrate's ability to determine probable cause."

Based on the above, the trial court granted defendant's motion to suppress the evidence and held that a district court magistrate is not sufficiently neutral and detached for the purpose of issuing search warrants where he is also a court officer deputized with full police powers.

We hold that the trial court erred by granting defendant's motion to suppress. Under the facts of the instant case, the magistrate's affiliation with the sheriff's department, without more, is insufficient to support the finding by the trial court that the magistrate was not sufficiently neutral and detached.

In *Coolidge v New Hampshire*, 403 US 443, 449; 91 S Ct 2022; 29 L Ed 2d 564 (1971), the United States Supreme Court wrote:

> "The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson v United States*, 333 US 10, 13-14; 68 S Ct 367,369; 92 L Ed 436:
>
> " 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.* * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.' "

In *Shadwick v City of Tampa*, 407 US 345, 350; 92 S Ct 2119, 2123; 32 L Ed 2d 783, 788 (1972), the United States Supreme Court established a two-part test to determine who may qualify as a magistrate and thus have the power to issue search and arrest warrants. First, the magistrate must be neutral and detached and, second, the magistrate must be capable of determining whether or not probable cause exists for the requested search or arrest. We address only the first part of the test.

In the instant case, there was no showing that the magistrate was engaged in the "enterprise of ferreting out crime," and thus

could not be neutral and detached. On the contrary, the trial court specifically found that the magistrate "has not participated in any criminal investigation nor worked road patrol" since becoming magistrate.

This was not a situation where, as in *Coolidge, supra,* the issuing magistrate was also the prosecuting attorney who had taken personal control of the criminal investigation. Neither is this a situation, as in *People v Lowenstein,* 118 Mich App 475; 325 NW2d 462 (1982), where the magistrate had previously prosecuted defendant and been sued by defendant.

We hold that a mere affiliation, without more, between a magistrate and a law enforcement group is insufficient to support a finding that a magistrate is not neutral and detached.[1] Where, as here, an affiliation exists but there is no active pursuit by the magistrate of a law enforcement career, the magistrate is sufficiently neutral and detached for the purpose of issuing warrants.

Reversed.

/s/ John H. Gillis
/s/ John H. Shepherd
/s/ James J. Kelley

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[1]

We note under Const 1963, art 6, § 29, each judge of this panel is a conservator of the peace within this state and can arrest for misdemeanors committed in his presence. *City of Lincoln Park v Sigler,* 28 Mich App 410; 184 NW2d 524 (1970).

APPENDIX "B"

STATE OF MICHIGAN
SUPREME COURT

Released February 18, 1986

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RICHARD DAVID PAYNE, Defendant-Appellant.	No. 74429

BEFORE THE ENTIRE BENCH

RYAN, J.

The issue in this case is whether a valid search warrant may be issued by a district court magistrate who is also a deputy sheriff. The circuit court concluded that the warrant was invalid, but the Court of Appeals reversed. We agree with the circuit court and reverse the decision of the Court of Appeals.

I

The defendant is charged in a four-count information with two counts of unlawfully driving away an automobile [1] and two counts of receiving and concealing stolen property. [2] Two vehicles are involved with alternate charges of UDAA and receiving and concealing as to each. The evidence against the defendant includes a number of items seized from his parents' home pursuant to a search warrant issued by 75th District Court Magistrate William P. Mitchell. The defendant filed a motion to suppress these items on the ground that, in addition to his role as magistrate, Mr. Mitchell was a deputy sheriff. There was an evidentiary hearing at which Mr. Mitchell testified about his duties and his several roles as court officer, deputy court administrator, magistrate, and deputy sheriff.

An explanation of Mr. Mitchell's various roles can be found in the settled concise statement of facts and proceedings certified by the circuit court:

> "William P. Mitcheli has been deputy court administrator and court officer for the 75th District Court of Midland County since approximately January 1, 1969. In November of 1979 he assumed the additional responsibilities of magistrate.
> "Since January, 1969, William P. Mitchell has been a duly sworn member of the Midland County Sheriff's Department, having full police powers. He retains that status, as court officer, to occasionally transport prisoners and be capable of keeping order in the courtroom including his power to arrest.
> "Mr. Mitchell has also periodically attended monthly meetings of the Midland County Reserve Deputies in order to receive training. Since becoming magistrate he has not participated in any criminal investigation nor worked road patrol.
> "Mr. Mitchell did not know the defendant nor any member of defendant's family where the search warrant was executed and accordingly, no claim of personal bias has been argued.
> "Furthermore, there is no contest regarding probable cause for the search warrant to issue nor the magistrate's ability to determine probable cause."

After initially denying the motion, the circuit court granted the motion to suppress, concluding that while no actual impropriety by Mr. Mitchell had been alleged or shown

"[t]he law is clear that any current connection with a magistrate and law enforcement fails to satisfy the appearance of justice."

The court entered an order dated August 16, 1983, suppressing the evidence seized pursuant to the warrant.

The prosecutor filed an application for leave to appeal to the Court of Appeals, and the application was granted. Throughout the case, the defendant has relied on *People v Lowenstein*, 118 Mich App 475; 325 NW2d 462 (1982). In *Lowenstein*, the Court of Appeals upheld the trial court's suppression of an arrest warrant

on the grounds that the issuing magistrate was not "neutral and detached." The magistrate who issued the warrant for defendant Lowenstein's arrest was a former prosecuting attorney. During his tenure as prosecutor, the magistrate prosecuted the defendant on charges unrelated to the contested arrest warrant and was personally acquainted with the defendant. Prior to the issuance of the warrant, defendant Lowenstein had named the magistrate as a defendant in a multi-million dollar civil suit. In affirming the suppression of the arrest warrant, the Court of Appeals emphasized the appearance of impropriety that the magistrate created when he issued an arrest warrant for a person who previously had unsuccessfully, and perhaps frivolously, sued him.[3]

In this case, the Court of Appeals reasoned that the nature of the magistrate's law enforcement activities was critical to the result in *Lowenstein* and reversed, concluding:

> "We hold that a mere affiliation, without more, between a magistrate and a law enforcement group is insufficient to support a finding that the magistrate is not neutral and detached. Where, as here, an affiliation exists but there is no active pursuit by the magistrate of a law enforcement career, the magistrate is sufficiently neutral and detached for the purpose of issuing warrants." *People v Payne*, 134 Mich App 68, 72; 350 NW2d 835 (1984)

II

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment

> "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and privacies of life,' from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all 'unreasonable' searches and seizures, and by requiring the use of warrants, which particularly describe 'the place to be searched, and the persons or things to be seized,' thereby interposing 'a magistrate between the citizen and the police.' " *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 301; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

Absent exceptional circumstances, the Fourth Amendment mandates that an "independent judicial officer," not the police, determine "whether liberty or privacy is to be invaded." *Jones v United States*, 362 US 257, 270-271; 80 S Ct 725; 4 L Ed 2d 697; 78 ALR2d 233 (1960).

In *Johnson v United States*, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1948), the Supreme Court stated that probable cause must ordinarily be determined by a "neutral and detached magistrate":

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of

> search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." 333 US 13-14.

A search warrant is invalid if the issuing magistrate also was an active participant in the investigation or prosecution of the underlying crime. *Coolidge v New Hampshire*, 403 US 443, 453; 91 S Ct 2022; 29 L Ed 2d 564, 575 (1971); *Lo-Ji Sales, Inc. v New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979). In *Coolidge*, the attorney general who issued the warrant participated in the investigation and later prosecuted the case. The Court stated that "there could hardly be a more appropriate setting than this for a per se rule of disqualification rather than a case-by-case evaluation of all the circumstances." 405 US 450.

The United States Supreme Court has not decided whether mere status as a law enforcement official, in and of itself, renders a magistrate incapable of being "neutral and detached." The Court has stated, in the process of defining "neutral and detached magistrate," that "someone independent of the police and prosecution must determine probable cause. . . .Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Shadwick v Tampa*, 407 US 345, 348, 350-351; 92 S Ct 2119; 32 L Ed 2d 783 (1972).

Our review of decisions in the state and federal courts reveals that Georgia is the only state in which a recorded appellate decision has addressed the specific issue before us today.[4] In *Vaughn v State*, 160 Ga App 283, 284; 287 SE2d 277 (1981), the Georgia Court of Appeals held that a justice of the peace who was also a sworn and bonded, albeit inactive, deputy sheriff was not a "neutral and detached magistrate" under the Fourth Amendment.

The judge's dual status " 'per se' disqualified [him] as a neutral and detached magistrate. *Coolidge v New Hampshire*, 403 US 450." The Georgia Court's conclusion relied in part upon the separation of powers provision of the Georgia Constitution. The Court stated that the judge was improperly authorized to exercise

both executive and judicial functions. Such dual status, the Court said, "negates any possibility of a finding that Judge Broom was a neutral and detached magistrate." 160 Ga App 284.

III

While the decision of the Georgia Court is of no precedential force here, we believe its reasoning is sound.

Article 3, § 2 of the Michigan Constitution provides:

> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

In issuing the search warrant in this case, Magistrate Mitchell exercised judicial power while holding the office of deputy sheriff in the executive branch. Concerning the exercise of judicial powers by an official of the executive department, the United States Supreme Court has said:

> "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.
>
> * * * *
>
> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and

> levels of Government." *United States v United States Dist Court*, 407 US 297, 317; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

We think that Magistrate Mitchell's status as a deputy sheriff rendered him incapable of satisfying the "neutral and detached" requirement of the Fourth Amendment and its counterpart provision in art 3, § 2 of the Michigan Constitution. The probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch.

We disagree with the prosecutor's argument that active involvement in "ferreting out crime either from an investigatory or prosecutorial standpoint" is required before a magistrate's issuance of a warrant should be struck down.

The very fact that Magistrate Mitchell is a deputy sheriff establishes that his professional loyalty is divided. He is bound by oath to faithfully carry out the duties of both a judicial officer and a police officer. While Magistrate Mitchell's professional loyalties to the two offices need not always be at odds, they are very much in conflict when he is asked by law enforcement officials to issue a judicial writ such as a search warrant. In such circumstances, he cannot, perforce, be a "neutral and detached" magistrate. He is, by the terms of his law enforcement oath, "non-neutral" toward law enforcement interests, and he is very much "attached" to his office of deputy sheriff. Our holding is unaffected by the lack of proof of any actual pro-police bias on the part of Magistrate Mitchell. The issue does not turn upon a contest of proof of Magistrate Mitchell's deeper or more profound commitment as judge or as part-time deputy sheriff. As Mr. Justice Bradley stated over a century ago in *Boyd v United States*, 116 US 616, 635; 6 S Ct 524; 29 L Ed 746 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

We reverse the judgment of the Court of Appeals and reinstate the circuit court's order suppressing the evidence seized pursuant to the warrant.

1

MCL 750.413; MSA 28.645.

2

MCL 750.535; MSA 28.803.

3

In *Lowenstein*, p 483, the Court said:

"Certain situations have been identified as requiring dismissal when the appearance of impropriety is too great even though no actual prejudice is shown. First, '[a]n official associated in any way with the prosecution of alleged offenders, because of his allegiance to law enforcement, cannot be allowed to be placed in a position requiring the impartial judgment necessary to shield the citizen from unwarranted intrusions into his privacy.' *State v Ruotolo*, 52 NJ 508, 512; 247 A2d 1, 3 (1968). In other words, an otherwise duly appointed magistrate who just happens to be connected with law enforcement may not constitutionally issue warrants. *Vance v North Carolina*, 432 F2d 984 (CA 4, 1970)."

4

The Ohio appellate decision of *State v Furry*, 31 Ohio App 2d 107; 286 NE2d 301 (1971), is inapposite. The Court failed to cite *Coolidge*, although it had been decided earlier that year.

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 74429

RICHARD DAVID PAYNE,

Defendant-Appellant.

BOYLE, J. (dissenting).

I respectfully dissent.

In *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971), the United States Supreme Court held that the Fourth Amendment required that a State Attorney General be disqualified per se from issuing a search warrant. The Court found that the determination of probable cause made by the chief government enforcement agent of the state "who was actively in charge of the investigation and later was to be chief prosecutor at the trial,"id. at 450, violated the constitutional requirement that probable cause be determined by a neutral and detached magistrate.

The following year, *Shadwick v City of Tampa*, 407 US 345; 92 S Ct 2119; 32 L Ed 2d 783 (1972), upheld the authority of a municipal court clerk to issue arrest warrants on charges of violations of municipal ordinances. The Court rejected the claim

that because clerks were appointed by the city clerk, "an executive official," id. at 348, they were not sufficiently independent to be judicial officers.

While the Court stated that, "[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement," id. at 350, the Court expressly rejected an invalidation per se of a state or local warrant system "on the ground that the issuing magistrate is not a lawyer or judge." Id. at 352. Instead, the Court noted that there was no showing on the record of affiliation with prosecutors or police, of partiality, or of any connection with law enforcement activity "which would distort the independent judgment the Fourth Amendment requires." Id. at 350-351. The Court observed that judges were likewise subjected to appointment or election and that most were dependent for their salary level upon the legislative branch. The Court concluded:

> "The clerk's neutrality has not been impeached; he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge." Id. at 351.[1]

I am unable to agree that the Fourth Amendment requires the disqualification of William Mitchell per se and the invalidation of the warrant.

The record establishes only that Mitchell was deputized as a deputy or reserve sheriff and occasionally attended meetings of the reserves. The magistrate found that he had not had any active

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[1]The Court appears to have also rejected disqualification per se in *Lo-Ji Sales, Inc. v New York*, 442 US 319, 327; 99 S Ct 2319; 60 L Ed 2d 920 (1979), where it concluded from the "objective facts of record," that a local justice's involvement in a search party eroded whatever neutral and detached posture parties existed at the outset.

involvement in criminal investigation or road patrol since becoming a magistrate in 1969.

On this record, in other than his courtroom duties, Mr. Williams is a deputy in name only. As the Court cautioned in *Shadwick, supra* at 350, "The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party." Like the clerk in *Shadwick,* Mr. Mitchell is removed from the prosecution and the police. He works within the judicial branch, subject to the authority of the district judge. In short, on this record, there is no basis to find that the magistrate's neutrality was impeached. I would affirm the judgment of the Court of Appeals.

Patrick J. Boyle

APPENDIX "C"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE PEOPLE OF THE STATE OF MICHIGAN, Plantiff, v RICHARD DAVID PAYNE, Defendant.	File No. 83-004492-FY-G

MOTION TO SUPPRESS

NOW COMES the above named Defendant by and through his attorneys, DURANCE & RHEAD, and moves the Court for the entry of an Order Suppressing from evidence in this case the following goods, chattels and articles of property, to-wit:

One Sears and Roebuck AM-FM C. B. Radio, Model No. 564626760

One AM-FM C. B. Radio

One 2 x 4 x 9 inch piece of weathered wood

Four 12-15 LC tires and wheels

for the reason that these above articles were illegally seized by police officers in the County of Midland and State of Michigan in violation of the rights, privileges and immunities granted to

the Defendant under the Constitution and laws of the State of Michigan for the reason that said goods, chattels and articles of property were seized pursuant to a Search Warrant and Affidavit that was issued by the Honorable William P. Mitchell, Magistrate, for the reason that said Magistrate was not neutral and detached contrary to the laws of the State of Michigan and the laws of the United States of America.

DATED: March 17, 1983

Respectively submitted,

Robert J. Rhead/s/
Robert J. Rhead (P19383)

DURANCE & RHEAD
Attorneys for Defendant
125 West Larkin Street
Midland, MI 48640